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Final Report of the Working Group to Improve the Provision of Indigent Legal Services

Maine State Legislature

Maine Office of Policy and Legal Analysis

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**STATE OF MAINE
128th LEGISLATURE
FIRST REGULAR SESSION**

**Working Group to Improve the Provision of Indigent
Legal Services**

December 2017

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Sen. Shenna Lee Bellows
Rep. Roger L. Sherman
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Executive Summary

The Working Group to Improve the Provision of Indigent Legal Services was created as part of the 2018-2019 Biennial Budget to identify and resolve concerns about the delivery of court-appointed legal services and the costs associated with those services.

The authorizing legislation directs the Working Group to develop recommendations to improve the delivery of indigent legal services to those eligible to receive such services by focusing on four interrelated duties:

- Ensuring adequate representation;
- Increasing the efficiency in delivering legal services;
- Verifying eligibility throughout representation; and
- Reducing costs while still fully honoring the constitutional and statutory obligations to provide representation.

The Working Group met four times, and benefited greatly from the participation of the Sixth Amendment Center. The Working Group makes the following recommendations:

1. Strengthen the Maine Commission on Indigent Legal Services to take on a more robust policy-making and oversight role;
2. Enhance the Maine Commission on Indigent Legal Services staff to provide better financial accountability as well as quality assurance by establishing specific responsibilities for a Chief Financial Officer and a Training and Quality Control Director;
3. Immediately fill the existing funded positions of financial screener for Cumberland County and office associate;
4. Strengthen the financial eligibility screening procedure;
5. Remove the collections function from the Maine Commission on Indigent Legal Services and have the Judiciary Committee explore alternative methods of collecting from those recipients of legal services who have been ordered by the court to contribute to the costs of those services;
6. Transfer the responsibility of appointing defense counsel in specific cases from judges to the Maine Commission on Indigent Legal Services;
7. Commission an outside, independent, nonpartisan study of Maine's current system of providing indigent legal services and whether alternative methods of delivery would increase quality and efficiency;
8. Encourage the Chief Justice to convene regional discussion panels to talk about how to make the entire criminal justice system more sensible and more efficient; and
9. Reduce external factors that may increase the need for indigent legal services.

The Working Group is relying on the Judiciary Committee and eventually the Legislature as a whole to develop specific language and proposals to carry out these recommendations, including the timing for implementation.

I. INTRODUCTION

The Working Group to Improve the Provision of Indigent Legal Services was created as part of the 2018-2019 Biennial Budget to identify and resolve concerns about the delivery of court-appointed legal services and the costs associated with those services. In addition to establishing the Working Group, Public Law 2017, chapter 284, Part UUUU made multiple changes to the existing law governing the Maine Commission on Indigent Legal Services, mostly to address data collection and ensuring eligibility for court-appointed attorneys. The legislation authorizing the Working Group and outlining its duties is attached as Appendix A.

The Working Group consists of four legislators (two Senators and two members of the House of Representatives), two members appointed by the Chief Justice, one of whom must be an attorney rostered with the Maine Commission on Indigent Legal Services, the President of the Maine Prosecutors Association, the Chair of the Maine Commission on Indigent Legal Services, the Director of the Governor's Office of Policy and Management, the designee of the Commissioner of Administrative and Financial Services and the designee of the Attorney General. The membership list is attached as Appendix B.

The authorizing legislation directs the Working Group to develop recommendations to improve the delivery of indigent legal services to those eligible to receive such services by focusing on four inter-related duties:

- Ensuring adequate representation;
- Increasing the efficiency in delivering legal services;
- Verifying eligibility throughout representation; and
- Reducing costs while still fully honoring the constitutional and statutory obligations to provide representation.

The Working Group met four times, once each in September, October, November and December 2017. The members initially focused on collecting Maine information about court-appointed attorneys, caseloads, overall costs, costs based on types of cases, non-attorney costs, prosecution costs and collection of reimbursement, as well as rules and procedures that govern the eligibility, selection and payment of court-appointed counsel. The Working Group also identified the need to ensure quality representation and sought information on training, supervision and evaluation of court-appointed counsel. The members recognized that the lessons learned by other jurisdictions in providing indigent legal services could be instructive in improving Maine's system and requested more information and invited the participation of experts in the subject area.

As the Working Group members reviewed the information and discussed the concerns that have been raised over the past few years about the work of the Maine Commission on Indigent Legal Services (MCILS), the members came to the realization that, although there is room for improvement, the legal services provided appear to be of good quality and are provided with a low overall budget when compared to other functioning systems across the country, and with a low overall budget when compared to the costs of prosecution in Maine. The current program does not have systemic oversight and evaluation of attorneys, and needs both a strong fiscal management component and the ability to be forward-thinking to create and take

advantage of more opportunities to continue improvements in quality and efficiency. Unknown, and worth exploring, is whether the current structure is the best way to provide quality indigent legal services in Maine as efficiently as possible. The Working Group identified several potentially cost saving initiatives that could be undertaken with current legal authority and within the current budget, including: exploring other methods of collecting fees owed by partially-indigent defendants; reforming supervision and management of attorneys to reduce review of individual vouchers and free up staff time for observation and training; and working with the courts and prosecutors to schedule hearings so that rostered attorneys appear for multiple cases at a time, rather than appearing for fewer cases on a particular day and spending time waiting for those cases to be called.

The Working Group makes the following recommendations.

1. The Working Group recommends that the Maine Commission on Indigent Legal Services be reconstructed to serve a robust policy-making and oversight role by increasing the number of members and diversifying the expertise of members to include experience in financial matters, mental health concerns and drug abuse issues. Although the Governor should continue to appoint and the Legislature confirm members, recommendations for memberships should come equally from all three branches of state government as well as those particularly interested in the provision of high quality indigent legal services.

2. The Working group recommends that the staff of the Commission be enhanced to provide better financial accountability as well as quality assurance. To achieve these goals, the Working Group recommends that the duties of the existing position of Deputy Director be revised to take on oversight and supervision of legal services, while creating a comparable position of a chief financial officer to be responsible for review of vouchers and payment of attorneys and general oversight of cost control. Together, these two positions will be tasked with providing the most efficient legal services within the parameters of quality representation.

3. The Working Group recommends that the existing positions of financial screener for Cumberland County and the office associate position be filled. Both positions are currently funded but remain vacant.

4. The Working Group supports financial eligibility screening and an effort to collect from those recipients of services who the court has ordered to contribute monetarily to the cost of the legal services provided. In addition to filling the vacant screener position, the Working Group recommends that the screening process include a revision of the counsel application form to make it clear that intentionally providing false information when requesting an attorney is a crime, and that the judge can question the person about the ability to pay and the truthfulness of the information provided. The new Chief Financial Officer's responsibilities will include strengthening the screening procedure, including following up as necessary.

5. The Working Group recommends that, in the long term, collections not be the responsibility of the Commission. Requiring the Commission to collect from the very individuals who receive the Commission's services creates a conflict of interest. The Working Group therefore recommends that the Judiciary Committee explore alternative methods of

collecting from those recipients of legal services who have been ordered by the court to contribute to the costs of those services.

6. The Working Group recommends that the Commission take over the actual appointment of attorneys to specific cases, which is a function currently handled by the courts. Initially, this will be a collaborative effort between the Judicial Branch and the Commission to ensure that competent legal counsel is appointed as soon as possible. Although appointment by MCILS will be much easier once the new case management, data storage and electronic filing system is implemented, the Working Group recommends that progress be made to transfer the appointment authority to the Commission as quickly as possible.

7. The Working Group acknowledges the Governor's fundamental concern about whether a different legal services delivery system is needed in Maine and recommends that a completely independent, outside, nonpartisan statewide study be conducted to explore what are the strengths and weaknesses of the current system in both quality and efficiency and whether there are alternative methods of delivery that would result in improvements. The study should include recommendations for improving Maine's system, including specific actions and cost estimates for achieving the recommendations.

8. The Working Group encourages the Chief Justice to convene regional discussion panels to talk about how to make the criminal justice system more sensible and efficient. The Working Group envisions the panels to consist of Judicial Branch personnel (both judges and clerks, as appropriate), prosecutors and defense attorneys to explore case management and scheduling changes that will result in improved efficiency. Child protection proceedings contribute significantly to the demands on indigent legal services, so the Attorney General's Office should be included with respect to those cases. Recommendations from the panels can guide the Courts, the Commission and the Legislature in making changes. The Working Group recommends that the Judiciary Committee examine the best way to collaborate with the Judicial Branch to develop deadlines for convening and making recommendations.

9. The Working Group recognizes that many of the factors that affect the overall costs of the provision of indigent legal services are outside the control of the Commission. The Working Group therefore recommends that the Judiciary Committee explore cost drivers that are not within the jurisdiction of the Commission but that the Legislature may be able to affect. Those outside influences include the statutory penalties for crimes (penalties can be reduced or the conduct decriminalized), the use of diversion in the criminal justice system, the promptness of discovery provided by law enforcement, practices by prosecutors (for example, indicating a risk of jail time in order to secure counsel for a person who is or appears to be mentally ill or who is facing potential severe non-criminal consequences), the promptness of discovery, the many consequences of mental illness substance abuse and addiction and the adjustments necessary to keep current with the use of technology across the criminal justice spectrum, such as the need to review audio-video from law enforcement body cameras.

The Working Group is relying on the Judiciary Committee and eventually the Legislature as a whole to develop specific language and proposals to carry out these recommendations, including the timing for implementation.

II. BACKGROUND

The importance of providing legal representation to those whose fundamental liberties are at stake cannot be overstated. The reason the Working Group exists is to resolve concerns about how the State of Maine is meeting its obligation to ensure that those entitled to an attorney have access to and the services of effective counsel.

The right to counsel in Maine is guaranteed by Article 1, Section 6 of the Maine Constitution and the Sixth Amendment of the United States Constitution, made applicable to the States through the Due Process Clause of the 14th Amendment. Maine has also enacted the right to be represented by effective counsel in statute for those noncriminal circumstances in which fundamental interests are at risk.

The law establishing the Maine Commission on Indigent Legal Services defines “indigent legal services” based on who is entitled to receive such services:

4. Indigent legal services. "Indigent legal services" means legal representation provided to:

- A. An indigent defendant in a criminal case in which the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation;
- B. An indigent party in a civil case in which the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation; and
- C. Juvenile defendants.

4 MRSA §1802, sub-§4.

In the years after the United State Supreme Court interpreted the Sixth Amendment to require that counsel be provided to defendants unable to employ counsel in *Gideon v. Wainright*, 372 U.S. 335 (1963), the courts in Maine shouldered the burden of paying for attorneys for the indigent. As the requirement was refined by court cases, the Maine Courts handled the responsibility as best they could, with the judge who presided over the case expected to review and approve the appointed attorney’s voucher for reimbursement. The appearance of a conflict of interest in this arrangement was noted but ignored because there was no other avenue for fulfilling the constitutional and statutory obligations. The Judicial Branch budget included funds for court-appointed attorneys, but when counsel costs increased, the Judicial Branch was forced to find savings elsewhere in its overall budget to cover the constitutionally-required costs. The Judicial Branch hired financial screeners to help determine the eligibility of those seeking appointed counsel and to help ascertain the ability to pay at least some of the representation costs of those determined to be partially indigent.

The Indigent Legal Services Commission, often referred to as “The Clifford Commission” to recognize its Chair, Associate Supreme Court Justice Robert Clifford, was created by Chief Justice Saufley in 2008. The Clifford Commission designed a new, independent entity to oversee the provision of indigent legal services. The Legislature enacted the recommendations in 2009 as Public Law 2009, chapter 419. The new Maine Commission on Indigent Legal Services (MCILS) consists of a five-member board, appointed by the Governor and confirmed by the Legislature, as well as an Executive Director, Deputy Director, financial screeners and minimal support staff. It took over the responsibility for providing both constitutionally- and statutorily-required legal representation on July 1, 2010. Funding and personnel previously included in the Judicial Branch’s budget were transferred to MCILS in 2010. The report of the Commission is available on the Working Group’s website under “related resources”: <http://www.maine.gov/legis/opla/indigentlegal.htm>.

In establishing MCILS, the 2009 Clifford Commission relied on the American Bar Association’s “Black Letter *Ten Principles of a Public Defense Delivery System*” as guidance. The Working Group continues to refer to the guiding principles, and they are included as Appendix C.

The Commission retained much of the procedure that was developed by the Judicial Branch and that was in place when the responsibilities were transferred from the Judicial Branch to MCILS. The Commission adopted standards and a process for placing qualified attorneys onto a roster, and the judges continue both to determine eligibility and to appoint attorneys to represent those found eligible or partially eligible for services. (The court will enter an order that includes a reimbursement payment plan for a person found partially eligible.) The Commission organizes mandatory and optional training, reviews and processes vouchers and reviews and pays for private investigators and other non-attorney services, such as expert witnesses. MCILS also keeps and provides for review a large library of data; the staff continually revise the information recorded and tracked to keep up with requests for facts and figures.

The Maine system to provide indigent legal services has advanced significantly since 2010. As mentioned during the meetings of the Working Group, the indigent legal services system has matured from those early days of simply appointing newly-minted attorneys needing work, to a more structured approach to provide a roster of lawyers with training and appropriate experience for different types of cases. The review of vouchers and payment for counsel time is done completely independently of the courts, eliminating the appearance of a conflict of interest that haunted the former process.

The Working Group appreciates the progress the Commission has made so far in its short existence and recognizes that it is now time to take the next step and provide the capability to ensure quality representation while enhancing financial management expertise. Because the Commission operates with the bare minimum of staff, there is little current capacity to innovate and try different approaches to meet the indigent legal services obligations. As Governor LePage’s introduction of LD 1433 in the 127th Legislature and his original proposal of Part UUUU of the Budget to the 128th Legislature evidence, there is a need to explore whether there are alternatives to the current structure that can improve services while ensuring that the

provision of those services is done in an efficient and fiscally responsible manner, without sacrificing quality.

II. PROCESS

The Working Group was authorized to meet a total of four times between the First and Second Regular Sessions of the 128th Legislature. The members asked for and received volumes of information, mostly from the Commission, concerning everything from numbers of vouchers and average costs, to the hours of training provided. The Judicial Branch provided statistics comparing the number of cases in which defendants retained their own attorneys versus cases in which the court appointed counsel. The Maine Prosecutors Association spearheaded the collection of information about the costs of prosecution – for both District Attorney Offices and the Office of the Attorney General. Stephanie Anderson, Working Group member and President of the Maine Prosecutors Association estimated that, including overhead costs (paid by the counties for the District Attorneys) and including the Attorney General’s child protection enforcement expenditures, prosecution costs exceed \$27,400,000 a year. That compares with the total expenditures by MCILS in Fiscal Year 2017 of \$16,944,655.11 (which does not include the \$2.8 million shortfall for FY17 that was included in the FY18 budget to pay FY17 costs).

Marshall Pahl, the Deputy Defender General of Vermont’s Office of the Defender General discussed Vermont’s indigent legal services system with the Working Group via conference call at the Working Group’s third meeting. Vermont provides indigent legal services through a hybrid system of Public Defender offices, some of which are staffed by state employees in more densely populated areas, and some of which are operated under contracts in more rural areas. Although Vermont’s population is low, and the state is largely rural with a few more densely populated areas, like Maine, the total per capita costs involved in implementing a similar system to provide indigent legal services would be a significant increase for Maine.

The Working Group also benefited from the participation of David Carroll and Mike Tartaglia of the Sixth Amendment Center (6AC) an independent, nonpartisan, nonprofit established to ensure that every person receives constitutionally effective counsel. The 6AC assists states “by measuring public defense systems against Sixth Amendment case law and established standards of justice. When shortcomings are identified, [the Center] help[s] states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.” (<http://sixthamendment.org/about-us/>, under “Our Mission”, extracted December 6, 2017) The Working Group extends its sincere appreciation to Mr. Carroll and Mr. Tartaglia for their guidance in discussions and developing recommendations.

The Working Group held its final meeting on December 1, 2017, and reached consensus on several important recommendations, described below. Working Group members Jonathan LaBonte and Representative Roger Sherman were unable to attend; Mr. LaBonte and Working Group member David Heidrich, both representatives of the Executive Branch, and Representative Sherman did not weigh in on the recommendations.

The Working Group submits these recommendations with the expectation that the Joint Standing Committee on Judiciary will hold public hearings on the recommendations and give all interested parties a full opportunity to comment and make suggestions. The Working Group did not discuss issues related to the current funding of the Maine Commission on Indigent Legal Services but mentions, without detail, that such issues exist in order to ensure that the Judiciary Committee will consider and address the concerns. The Working Group relies on the expertise of the Judiciary Committee to develop specific legislation based on the recommendations and to resolve the funding questions.

IV. RECOMMENDATIONS

Recommendation 1: Strengthen the Maine Commission on Indigent Legal Services to take on a more robust policy-making and oversight role

Currently, the Maine Commission on Indigent Legal Services consists of five members who are appointed by the Governor for three year terms. These individuals “must have demonstrated a commitment to quality representation for persons who are indigent and have the skills and knowledge required to ensure that quality of representation is provided in each area of law”; no more than three commissioners may be engaged in the active practice of law. Of the five members, one must be chosen from a list of qualified potential appointees provided by the President of the Senate, one from a list provided by the Speaker of the House, and one from a list provided by the Chief Justice of the Supreme Judicial Court. When forming the lists, the President, Speaker and Chief Justice must consider input from persons and organizations with an interest in the delivery of indigent legal services. Each of the appointments is subject to review by the Joint Standing Committee on Judiciary and confirmation by the full Legislature.

The Working Group considered the purpose, structure and effectiveness of the Maine Commission and commissions in states across the country by looking at the composition of individual states’ commissions and to national guidelines from the American Bar Association’s *Ten Principles of a Public Defense Delivery System* (“Ten Principles”) and the National Study Commission on Defense Services’ *Guidelines for Legal Defense Systems in the United States* (“NSC Guidelines”). The Ten Principles are included in Appendix C; the NSC Guidelines are available at: http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf.

A major purpose of any oversight commission is to insulate the indigent defense functions from political or judicial pressures. This purpose is reflected in Principle 1 of the Ten Principles, which states that “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent.” The structure of the oversight commission helps ensure its independence, and diverse representation also leverages a variety of expertise from commissioners representing a range of interests impacted by the defense functions. The NSC Guidelines recommend that a commission consist of nine to thirteen members, a majority of whom are practicing attorneys, that those members represent many interests in the legal system and in indigent legal defense, and that no single branch of government should have a majority of votes on the commission. The NSC Guidelines also recommend that sitting judges, practicing

prosecutors and current law enforcement officials not sit on oversight commissions because of the potential conflicts of interest. The Sixth Amendment Center noted that many jurisdictions prohibit anyone from serving on a commission who stands to benefit financially from the policies of the commission, but also discussed how some jurisdictions have included members with specialized expertise in an area that particularly affects that state, such as Native American or African American interests.

With this background, the Working Group recommends that the Maine Commission on Indigent Legal Services be expanded from five members to nine members, two of whom would be chosen by the Governor, one from a list of qualified candidates provided by the President of the Senate, one from a list of qualified candidates provided by the Speaker of the House, and two from a list of qualified candidates provided by the Chief Justice of the Supreme Judicial Court. For the remaining three members, the Working Group recommends that one be appointed from a list of qualified candidates provided by the Board of Bar Overseers, that one be appointed from a list of qualified candidates provided by the State bar association or an association of criminal defense attorneys and that the final appointee possess specialized expertise in an area such as financial management, mental health or drug addiction. The Sixth Amendment Center recommended to the Working Group that no more than seven members be attorneys engaged in the active practice of law, and that no one appointed be a sitting judge, active prosecutor, active law enforcement official, or active indigent defense provider; the Working Group discussed but did not agree on whether active indigent defense providers should be prohibited from serving on the Commission. The Working Group considered the appointment process in current law and did not recommend any change in that process. The Sixth Amendment Center's *A Primer on National Standards regarding Right to Counsel Commissions* is attached as Appendix D.

The Working Group believes that expanding the Commission membership has the potential to give the Commission the opportunity to identify and support specific quality assurance goals, as well as to innovate and experiment with different options for delivering services, review compliance with the ABA 10 Principles and applicable case law, and establish other new initiatives it determines will efficiently improve the provision of services. The Commission should also determine what are the best practices both within and outside the State, what data should be collected and analyzed to identify where the most urgent problems exist, and determine how that data can support improvements in the areas of greatest need. The Working Group anticipates that increased data collection will improve the accuracy of budget projections.

Recommendation 2: Enhance the Maine Commission on Indigent Legal Services staff to provide better financial accountability as well as quality assurance by establishing specific responsibilities for a Chief Financial Officer and a Training and Quality Control Director

The Working group recommends that the structure and staff of the Commission be enhanced to provide better financial accountability as well as quality assurance. To achieve these goals, the Working Group recommends that the duties of the existing position of Deputy Director be revised to take on oversight and supervision of legal services, while creating a comparable position of a chief financial officer to be responsible for review of vouchers and payment of attorneys and general oversight of cost control. Together, these two positions will be

tasked with providing the most efficient legal services within the parameters of quality representation.

Two concerns raised about the current system of providing indigent legal services are (1) the structure and activities of the Commission do not include the ability to supervise or evaluate the quality of the legal services provided, and (2) the Commission does not have the capacity to manage costs that have increased significantly over time. The Working Group concluded that these concerns are partly a function of the number of Commission staff and their focus on the review of vouchers.

Although the Working Group does not intend to micromanage the Commission or its work, having confidence in a newly invigorated and expanded Commission, the Working Group does have specific recommendations for enhancing both financial management and quality assurance. These recommendations are based on lessons learned in other states and the advice of the Sixth Amendment Center. The Working Group recommends that the staff be reconfigured to establish one person responsible for quality assurance and one person responsible for financial management. There is currently one Deputy Director; the Working Group recommends that the position be retained but that the position becomes the Training and Quality Control Director and that a new position be added that serves as the Chief Financial Officer. Although these positions will have specific separate responsibilities, they will work together when their responsibilities intersect to make for the most efficient planning and operation.

Training and Quality Control Director

The Working Group recommends that the Training and Quality Control Director be an attorney and have, at a minimum, the following responsibilities:

1. Manage all training operations:
 - A. Identify training needs for attorneys and create a strategic plan to meet those needs;
 - B. Responsible for the design, delivery, coordination and procurement of practice area specific training by case type: homicides, sex offenses, serious violent felonies, child protective, juvenile defense, etc.; and
 - C. Responsible for the design, delivery, coordination and procurement of non-practice area specific training such as: working with clients from different cultures or backgrounds, immigration issues, dealing with racism within the criminal justice system, and case management; supervision; technology; secondary trauma and mentor training, as well as orientation for new attorneys;
2. Establish supervision and evaluation protocols for all rostered attorneys:

- A. Provide supervision of attorneys or, if an intermediary level of resources and supervision is implemented, provide direct supervision of such regional resource coordinators¹;
 - B. Assist in the development and dissemination of standards, procedures and policies to ensure services are provided consistently throughout the state;
 - C. Consolidate and make available to assigned attorneys information on official opinions, legal briefs and other relevant information;
 - D. Develop resources to provide assistance with research or legal briefs and provide other technical assistance to attorneys; and
 - E. Develop evaluation protocols to assess attorney performance. The evaluation protocols may include the participation of regional resource coordinators, judges, prosecutors, attorneys and other participants;
3. In collaboration with the Chief Financial Officer, develop quantifiable measures with respect to cost drivers and attorney performance;
 4. Make regular reports to the Commission on variances to board standards and guidelines with respect to each district;
 5. Work with the Chief Financial Officer to explore methods of improving the provision of indigent legal services in cost-effective ways; and
 6. Perform all other duties assigned by the MCILS Director.

Chief Financial Officer

The Working Group recommends that the Chief Financial Officer have, at a minimum, the following responsibilities:

1. Oversee system to pay attorneys for services;
 - A. Develop an efficient process to provide for accountability with spot checks or other methods;
 - B. Ensure prompt payment to attorneys; and

¹ MCILS is currently exploring the implementation of a new program to provide resources to attorneys on a regional basis by contracting with experienced attorneys to serve as mentors and provide supervision and feedback. Other states have implemented similar programs using “regional resource coordinators.” MCILS believes the contract costs are within the current budget.

C. Compare actual billings with payment guidelines to determine if fee schedules are appropriate and recommend adjustments as necessary;

2. Oversee financial eligibility screeners;
3. Explore successful methods used by other states and other agencies to combat fraud in the application for services and develop measures to reduce or eliminate fraud and otherwise improve the eligibility qualification process;
4. Establish criteria and metrics for standard contracts for experts, interpreters, investigators and other nonattorney service providers and ensure prompt payment;
5. In collaboration with the Training and Quality Director, develop quantifiable measures with respect to cost drivers and attorney performance;
6. Evaluate opportunities for outsourcing functions done in-house;
7. Integrate the MCILS system with the Judicial Branch's new electronic data system and work with the Judicial Branch to collect and utilize data;
8. Develop requests for proposals where there appear to be opportunities for efficiencies;
9. Make recommendations about streamlining processes (e.g., costs of appellate briefs, utilizing non-attorneys to perform some work when appropriate);
10. Developing the budget for presentation to the Legislature; and
11. Perform all other duties assigned by the MCILS Director.

Recommendation 3: Immediately fill the existing funded positions of financial screener for Cumberland County and office associate;

The Working Group recommends that the existing positions of financial screener for Cumberland County and the office associate position be filled. Both positions are currently funded but remain vacant.

The Maine Commission on Indigent Legal Services has six full-time screener positions and three part-time screener positions that are currently funded by the Legislature. The financial screeners work in courthouses throughout Maine to help determine the financial eligibility of people applying for counsel at State expense. One of the part-time screener positions has investigatory responsibilities; that screener/investigator is responsible for conducting research to verify the information provided in applications for assigned counsel. This person investigates applications for counsel forwarded by other financial screeners working in courthouses around the state. The applications forwarded to the screener/investigator consist of both applications

that are flagged by the courthouse screener as warranting further investigation and applications selected at random for further review.

The financial screener located in Cumberland County resigned in December 2016; the position has remained vacant due to the Executive Branch hiring freeze in place, despite requests by the Commission for permission to hire a screener for the busiest courthouse in the State. Financial screeners based in other courthouses are not interested in relocating and cannot take on the additional workload.

The Working Group believes that the financial screeners serve valuable functions. It is important to protect the State's fiscal resources and be responsible about using dollars appropriately; financial screeners are the first step in making sure those seeking State-paid counsel are actually eligible. Persons found partially eligible contributed over \$667,000 in reimbursements in fiscal year 2017. The close scrutiny also protects people who deserve court-appointed counsel, because a screener can understand the circumstances comprehensively and make a nuanced argument when representation is truly appropriate.

The Working Group believes it is important for the financial screeners to be fully staffed and functional as soon as possible, and encourages all who have a role to play in the hiring and approval to collaborate to accomplish that goal.

In addition, the Commission staff is currently working without an Office Associate, although the position is approved and funded but not filled, also subject to the current hiring freeze. The Director and Deputy Director cover the duties that would normally be assigned to the position. The Working Group believes it will be important to fill this position once the other recommendations – a larger, more robust Commission and the enhanced responsibilities of a Chief Financial Officer and a Training and Quality Control Director – are implemented.

Recommendation 4: Strengthen the financial eligibility screening procedure

The Working Group supports financial eligibility screening and an effort to collect from those recipients of services who the court has ordered to contribute monetarily to the cost of the legal services provided. In addition to filling the vacant screener position, the Working Group recommends that the screening process include a revision of the form to make it clear that intentionally providing false information when requesting an attorney is a crime, and that the judge can question the person about the ability to pay and the truthfulness of the information provided. The new Chief Financial Officer's responsibilities will include strengthening the screening procedure, including following up as necessary.

In addition to having the personnel to conduct the screening, the financial screeners should have the appropriate tools to make the screening process as simple but as accurate as possible. Although no documented evidence was provided to the Working Group that applicants for court-appointed attorneys may at times be less than truthful in professing eligibility for services, there is a perception in some minds that this occurs on a regular basis. The Working Group believes that at least two steps should be taken to improve the validity of appointments.

First, the form applicants fill out when requesting state-paid counsel should clearly state that providing false information is a crime and can result in the imposition of penalties. It should also provide notice to the applicant that the judge who makes the eligibility determination can and will question the accuracy of the information provided. The Working Group discussed that judges could regularly follow up with those appearing before them as to whether the information is accurate, but some members expressed concerns with the potential due process issues such a follow-up could raise.

As included in Recommendation 2, the Working Group recommends that the Chief Financial Officer not only oversee the work of the financial screeners, but also explore ways to eliminate fraud and improve the eligibility qualification process, including looking at the procedures Department of Health and Human Services is following now.

Recommendation 5: Remove the collections function from the Maine Commission on Indigent Legal Services and have the Judiciary Committee explore alternative methods of collecting from those recipients of legal services who have been ordered by the court to contribute to the costs of those services

The Working Group recommends that, in the long term, collections not be the responsibility of the Commission. Requiring the Commission to collect from the very individuals that receive the Commission's services creates a potential conflict of interest. The Working Group therefore recommends that the Judiciary Committee explore alternative methods of collecting from those recipients of legal services who have been ordered by the court to contribute to the costs of those services.

If the judge determines that a person applying for indigent legal services has ability to pay a portion of the costs, the judge will appoint an attorney and issue an order directing the person to pay a specific amount for those legal services. The money collected, often through payments to the court clerk that are forwarded to MCILS, ends up in an Other Special Revenue Account of MCILS that is subsequently used to pay attorney compensation. Collections for 2017 exceeded \$670,000.

Financial screeners currently engage in some collection activities, and the MCILS account has benefited by about \$25,000 a year from income tax refund setoffs. In addition, MCILS has authority to enter into contracts for collection activities. The Working Group believes it is important that the court orders for reimbursement be followed, but does not believe that MCILS should be responsible for enforcement. Mr. Carroll of the Sixth Amendment Center said that indigent legal services providers are notoriously bad at these collections, noting the conflict of interest of an agency that is providing services prosecuting its own clients. Nor can MCILS rely on the Judicial Branch to be its collection arm, as the Judicial Branch is not in the position to engage in additional collection activities. The Working Group recommends that the Judiciary Committee explore alternative methods of ensuring that those who have been determined to be partially indigent do, in fact, carry through with their obligation to contribute to their costs of representation.

Recommendation 6: Transfer the responsibility of appointing defense counsel in specific cases from judges to the Maine Commission on Indigent Legal Services

The US Supreme Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), *United States v. Cronin*, 466 U.S. 648 (1984) and *Powell v. Alabama*, 287 U.S. 45 (1932), has found that the effective assistance of counsel is constitutionally protected. *Powell* and *Cronin* expressly recognize that circumstances surrounding a case can be such that no lawyer would likely be able to provide effective assistance. 466 U.S. 648, 661. Such compromising circumstances can impinge on the independence of the public defense function, which is included as the first of the ABA Ten Principles of a Public Defense Delivery System. See Appendix C. The independence of defense counsel may be inadvertently compromised by judicial appointments of attorneys to cases because those attorneys may, whether consciously or not, alter their defense to please the judge rather than focus solely upon advocating for the interests of the client.

Judges currently appoint attorneys to provide counsel in specific cases by choosing from a roster of qualified attorneys maintained by MCILS. In order to prevent explicit or implicit pressure from the judiciary on attorneys to accept more cases than they can ethically handle or otherwise compromise the interests of the client in order to please a judge who may make the determination of whether to award future appointments, the Working Group found that ideally the appointment of counsel should be undertaken by an independent body outside of the judiciary.

Accordingly, the Working Group recommends that eventually responsibility for assigning defense counsel in specific cases be moved from the Judicial Branch to MCILS. The Working Group understands that the Judicial Branch is undergoing a transition to a new case management, data storage and electronic filing system and therefore envisions the transition be a collaborative effort between the Judicial Branch and MCILS. However, the Working Group recommends that progress be made to transfer the assignment authority to MCILS as quickly as possible. The Working Group recommends that MCILS and the Judicial Branch cooperatively explore the details of transitioning attorney assignment authority.

Recommendation 7: Commission an outside, independent, nonpartisan study of Maine's current system of providing indigent legal services and whether alternatives methods of delivery would increase quality and efficiency

The Working Group acknowledges Governor LePage's fundamental concern about whether a different system is needed in Maine to deliver indigent legal services. The Working Group recommends that a completely independent, outside, nonpartisan statewide study be commissioned to evaluate Maine's current delivery model and determine whether there are alternative methods of delivery that would improve quality and efficiency. The study should include recommendations for improving Maine's system, including specific actions and cost estimates for achieving the recommendations. The Working Group recommends that the State retain the Sixth Amendment Center for this study, which it has agreed to undertake at a cost of approximately \$110,000 and which it expects it could complete by early 2019.

Recommendation 8: Encourage the Chief Justice to convene regional discussion panels to talk about how to make the entire criminal justice system more sensible and more efficient

The Working Group encourages the Chief Justice to convene regional discussion panels to talk about how to make the process more efficient. The Working Group envisions the panels to consist of Judicial Branch personnel (both judges and clerks, as appropriate), prosecutors and defense attorneys to explore case management and scheduling changes that will result in improved efficiency. The Attorney General's Office should be included with respect to child protection proceedings and any other matters in which it participates meaningfully that contribute significantly to the demands on indigent legal services. Recommendations from the panels can guide the Courts, the Commission and the Legislature in making changes. The Working Group recommends that the Judiciary Committee examine the best way to collaborate with the Judicial Branch to develop deadlines for convening and recommendations.

Providing quality indigent legal services is the responsibility of the State as a whole, and all participants in the system play a role in promoting efficiency and quality. The Judicial Branch initiated meetings in a couple of locations, bringing prosecutors, MCILS and judges together to discuss different types of scheduling or assignments, a promising effort that could not be maintained at the time.

The Working Group believes this is a critical opportunity for all the participants to collaborate and find ways to ensure quality legal representation within appropriate fiscal parameters. The Working Group encourages the Chief Justice of the Supreme Judicial Court to convene discussions on a regional basis. The discussion must look at local "business" practices for ways to increase efficiency and improve services that work in that area.

Recommendation 9: Reduce external factors that may increase the need for indigent legal services

The Working Group recognizes that while there may be opportunities for increased efficiency in providing indigent legal services, there are also many outside factors that determine the quantity of those services that are needed. Among those factors are: mandatory minimum penalties for crimes, criminal penalties that may be too severe for the conduct, and criminal penalties for conduct that could be similarly be discouraged through civil penalties; the potential for increased use of diversion practices in the criminal justice system; practices of prosecutors who may indicate a risk of jail time in order to secure counsel for a person who is or appears to be mentally ill or who is facing potential severe non-criminal consequences; the promptness of discovery provided by law enforcement; the many consequences of mental illness, substance abuse and addiction; and the proliferation of cameras, which has increased use of audio and video recordings that require time consuming review by attorneys.

The Working Group recognizes that making specific recommendations on potential changes in these areas falls outside the scope of its duties, and Working Group members did not fully discuss or agree upon the level of impact each of these factors has on driving the costs of delivering indigent legal services. Accordingly, the Working Group recommends that the Judiciary Committee explore methods for addressing the pressure on indigent legal services created by these and other outside factors.

APPENDIX A
Authorizing Joint Order

Sec. UUUU-17. Working group established. Notwithstanding Joint Rule 353, the Working Group to Improve the Provision of Indigent Legal Services, referred to in this section as "the working group," is established.

1. Membership. The working group consists of 11 members appointed as follows:

A. Two members of the Senate appointed by the President of the Senate, including members from each of the 2 parties holding the largest number of seats in the Legislature;

B. Two members of the House of Representatives appointed by the Speaker of the House, including members from each of the 2 parties holding the largest number of seats in the Legislature;

C. Two members appointed by Chief Justice of the Supreme Judicial Court, at least one of whom is on a court-appointed attorney roster administered by the Maine Commission on Indigent Legal Services;

D. The Attorney General or the Attorney General's designee;

E. The Commissioner of Administrative and Financial Services or the commissioner's designee;

F. The Director of the Governor's Office of Policy and Management or the director's designee;

G. The President of the Maine Prosecutors Association or the president's designee; and

H. The Chair of the Maine Commission on Indigent Legal Services or the chair's designee.

2. Chairs. The first-named Senate member is the Senate chair and the first-named House of Representatives member is the House chair of the working group.

3. Appointments; convening. All appointments must be made no later than 30 days following the effective date of this section. The appointing authorities shall notify the Executive Director of the Legislative Council once all appointments have been completed. When the appointment of all members has been completed, the chairs shall call and convene the first meeting of the working group. If 30 days or more after the effective date of this section a majority of but not all appointments have been made, the chairs may request authority and the Legislative Council may grant authority for the working group to meet and conduct its business.

4. Duties. The working group shall develop recommendations to improve the delivery of indigent legal services to those eligible to receive such services in the State. The recommendations must focus on ensuring adequate representation, increasing the efficiency in delivering legal services, verifying eligibility throughout representation and reducing costs while still fully honoring the constitutional and statutory obligations to provide representation. Notwithstanding any other provision of law, the working group may access data maintained by the Maine Commission on Indigent Legal Services and shall maintain the confidentiality of any confidential information provided to the working group. The working group may invite the participation and input of additional interested parties and request information as necessary to carry out its duties.

5. Staff assistance. The Legislative Council shall provide necessary staffing services to the working group.

6. Report. No later than December 6, 2017, the working group shall submit a report that includes its findings and recommendations, including suggested legislation, for presentation to the 2nd Regular Session of the 128th Legislature. The Joint Standing Committee on Judiciary may report out to the Second Regular Session of the 128th Legislature legislation to implement recommendations on matters related to the report.

Sec. UUUU-18. Transfer from General Fund; indigent legal services. On or immediately after July 1, 2018, the State Controller shall transfer \$19,205,270 from the unappropriated surplus of the General Fund to the Maine Commission on Indigent Legal Services, Reserve for Indigent Legal Services program, Other Special Revenue Funds. Funds transferred pursuant to this section may not be transferred out of the Reserve for Indigent Legal Services program without legislative approval.

APPENDIX B

Membership List, Working Group to Improve the Provision of Indigent Legal Services

**WORKING GROUP
TO
IMPROVE THE PROVISION OF INDIGENT LEGAL SERVICES**

Public Law 2017, chapter 284, Part UUUU, Section 17

MEMBERS

Appointments by the President of the Senate:

- Senator Lisa Keim, Senate Chair
- Senator Shenna Bellows

Appointments by the Speaker of the House:

- Representative Barbara Cardone, House Chair
- Representative Roger Sherman

Appointments by the Chief Justice of the Supreme Judicial Court:

- David Flanagan
- Walter Hanstein, an attorney on the court-appointed roster administered by the Maine Commission on Indigent Legal Services

- Hunter Umphrey, Assistant Attorney General, designee of Attorney General Janet Mills

- David Heidrich, designee of Acting Commissioner Alec Porteous, Department of Administrative and Financial Services

- Jonathan LaBonte, Director, Governor's Office of Policy and Management

- District Attorney Stephanie Anderson, President, Maine Prosecutors Association

- Steve Carey, Chair, Maine Commission on Indigent Legal Services

Staff:

Peggy Reinsch, Senior Legislative Analyst

Craig Nale, Legislative Analyst

Office of Policy and Legal Analysis

APPENDIX C

ABA's Black Letter *Ten Principles of a Public Defense Delivery System*

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

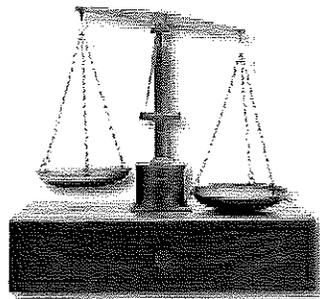
6 Defense counsel's ability, training, and experience match the complexity of the case.

7 The same attorney continuously represents the client until completion of the case.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9 Defense counsel is provided with and required to attend continuing legal education.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



APPENDIX D

**Sixth Amendment Center's *A Primer on National Standards
regarding Right to Counsel Commissions***



A Primer on National Standards regarding Right to Counsel Commissions

To help policymakers who may not be versed in constitutional law, the American Bar Association (ABA) promulgated the *Ten Principles of a Public Defense Delivery System* (“*Ten Principles*”), representing the “fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”¹

The first of the ABA *Principles* requires that the public defense function, including the selection, funding, and payment of defense counsel, be “independent.”² Commentary on *Principle 1* states that the defense function must be insulated from outside political or judicial interference by a board or commission appointed from diverse authorities, so that no one branch of government can exert more control over the system than any others.³

The *Ten Principles* rely in part on the National Study Commission on Defense Services’ (NSC) *Guidelines for Legal Defense Systems in the United States* (1976).⁴ The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10 (The Defender Commission)* states in part: “A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.”⁵

NSC *Guideline 2.10* continues on to state that Commission members should be selected under the following criteria: “(a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (b) The members of the Commission should represent a diversity

¹ TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, § ** (AM. BAR ASS’N 2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

² *Id.* at § 1.

³ *Id.* at § 1 cmt.

⁴ GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § ** (NAT’L STUDY COMM’N ON DEFENSE SERVS. 1976), available at http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf [hereinafter NSC GUIDELINES].

⁵ *Id.* at § 2.10.

of factions in order to ensure insulation from partisan politics; (c) No single branch of government should have a majority of votes on the Commission; (d) Organizations concerned with the problems of the client community should be represented on the Commission; [and] (e) A majority of the Commission should consist of practicing attorneys.”⁶

In practice, jurisdictions with indigent defense commissions generally give an equal number of appointments to the executive, legislative, and judicial branches of government.⁷ To fill out the remainder of appointments, governments often give responsibility for one or two positions to the state bar association. Additionally, many jurisdictions try to have a voice from communities impacted by the indigent defense function represented on the commission (for example, the African American Bar in Louisiana or Native American interests in Montana). Jurisdictions have also found that giving appointments to the deans of accredited law schools can create nexuses that help the indigent defense commissions (for example, law schools can help with standards-drafting, training facilities, etc.).⁸ Appointments by such non-governmental organizations generally must go through a confirmation process by an official branch of state government.

NSC *Guideline 2.10 (The Defender Commission)* states that the “Commission should not include judges, prosecutors or law enforcement officials.”⁹ Additionally, more and more states have found it a conflict of interest to have commission members who potentially stand to benefit financially from the policies of the commission. This means that states often ban criminal defense lawyers who handle public cases from sitting on these commissions.¹⁰ These prohibitions are only on *sitting* judges, defenders, and prosecutors, (and their staffs). States often find former judges, defenders, and law enforcement officials make good commission members.

Below is an example of how these standards could be implemented in Maine. It is not an endorsement of such a restructuring nor does it imply that this example is the only or best model for the citizenry of Maine. Rather, the following represents one way Maine could consider restructuring its Commission on Indigent Legal Services to better preserve the independence of the defense function. 6AC is happy to work around this proposal or explore other possibilities with the taskforce as the taskforce develops its recommendations to the Legislature.

⁶ *Id.*

⁷ Connecticut, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Carolina, Texas, Utah, and Virginia are examples.

⁸ Kentucky and New Mexico are examples.

⁹ NSC GUIDELINES, *supra* note 4, at § 2.10.

¹⁰ Idaho, Louisiana, Michigan, and Utah are examples.

§1803. Commission structure

1. Members; appointment; chair. The commission consists of 5 9 members appointed by the Governor and subject to review by the joint standing committee of the Legislature having jurisdiction over judiciary matters and confirmation by the Legislature. The Governor shall designate one member to serve as chair of the commission. One of the members must be appointed from a list of qualified potential appointees provided by the President of the Senate. One of the members must be appointed from a list of qualified appointees provided by the Speaker of the House of Representatives. ~~One~~ Two of the members must be appointed from a list of qualified potential appointees provided by the Chief Justice of the Supreme Judicial Court. Two of the members must be appointed from a list of qualified potential appointees provided by the President of the Maine State Bar Association. One of the members must be appointed from a list of qualified potential appointees provided by the Dean of the University of Maine Law School.

In determining the appointments and recommendations under this subsection, the Governor, the President of the Senate, the Speaker of the House of Representatives, ~~and~~ the Chief Justice of the Supreme Judicial Court, the President of the Maine State Bar Association, and the Dean of the University of Maine Law School shall consider input from persons and organizations with an interest in the delivery of indigent legal services.

2. Qualifications. Individuals appointed to the commission must have demonstrated a commitment to quality representation for persons who are indigent and have the skills and knowledge required to ensure that quality of representation is provided in each area of law. No more than 3 7 members may be attorneys engaged in the active practice of law. No person shall be appointed to the commission that is a sitting judge, prosecutor, law enforcement official, or indigent defense provider, or employees of all such persons.